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December 2, 2014

By Hand

The Honorable Victor Marrero
United States District Judge
Daniel Patrick Moynihan
United States Courthouse
500 Pearl Street, Room 1040
New York, New York 10007-1312

Anwar, et al. v. *Fairfield Greenwich Limited, et al.*,
No. 09-cv-118 (S.D.N.Y.) (VM) (FM)

Dear Judge Marrero:

On behalf of the Citco Defendants, we are writing to respond to the portion of plaintiffs' letter dated November 20, 2014, that discusses the district court's decision in *Osberg* v. *Foot Locker, Inc.*, No. 07-cv-1358 (KBF), 2014 WL 5800501 (S.D.N.Y. Nov. 7, 2014), *petition for perm to app. under Fed. R. Civ. P. 23(f) filed*, No. 14-3748(L), ECF No. 42 (2d Cir. Nov. 25, 2014). *Osberg* does not alter the conclusion that plaintiffs' motion for class certification should be denied.

Osberg certified a class alleging claims for plan reformation under ERISA. Such claims, the *Osberg* court held, do not require proof of reliance. *See id.* at *1. The *Osberg* court's discussion of reliance was consequently *dicta*. Here, in contrast,

proof of actual and reasonable reliance is essential to the *Anwar* plaintiffs' claims. (*See* Citco Opp. Br. 2-17, ECF No. 1323.)[1]

In any event, *Osberg*'s *dicta* concerning reliance have no application to *Anwar*. In *Osberg*, the court found that on the particular facts of that case, no reasonable juror could have accepted the defendant's position respecting reliance. *See* 2014 WL 5800501, at *6. In the view of the *Osberg* court, the defendant there "ha[d] proffered not a shred of evidence" that reliance would require an individualized inquiry. *Id.*

Here, in contrast, the Citco Defendants have identified substantial evidence demonstrating—among other propositions—that the alleged misrepresentations were not made uniformly to the putative class members; that substantial individualized issues of fact exist concerning whether any particular putative class member received the alleged misrepresentations prior to making a decision to invest; and that actual and reasonable reliance similarly involve substantial individualized inquiries. (*See* Citco Opp. Br. 2-17.)

Plaintiffs suggest that they are exempt from the jurisprudence generally governing attempts at class certification of reliance-based claims, because, they say, "[i]t is inconceivable that any investor would knowingly invest in a Ponzi scheme." (Pls.' Ltr. 2.) That contention is merely a rephrased version of the so-called fraud-created-the-market theory, which is the theory "that but for the defendant's fraud, no market for the securities would have existed at all." *Pa. Pub. Sch. Emps.' Ret. Sys.* v. *Morgan Stanley & Co.*, No. 13-2095-cv(L), 2014 WL 5487666, at *6 (2d Cir. Oct. 31, 2014). As our letter of November 17, 2014, explained, the Second Circuit's decision in *Pennsylvania Public School* rejected the fraud-created-the-market theory as a purported interpretation of New York law, and implicitly but unmistakably criticized that theory as a purported interpretation of the federal securities laws. *See id.* at *6-7.

Respectfully submitted,

Walter Rieman

Walter Rieman

cc: All counsel in *Anwar* (by e-mail)

The Clerk of Court is directed to enter into the public record of this action the letter above submitted to the Court by Citco defendants.

SO ORDERED.

12-3-14
DATE

VICTOR MARRERO, U.S.D.J.

[1] Capitalized terms have the meanings set forth in Citco's letter to Your Honor dated November 17, 2014.